IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on briefs January 25, 2006

STATE OF TENNESSEE v. JAMES WILLIAM "BO" JONES

Direct Appeal from the Circuit Court for Marshall County
No. 16362 Lee Russell, Judge

No. M2005-01209-CCA-R3-CD - Filed February 23, 2006

The Defendant, James William "Bo" Jones, pled guilty to one count of conspiracy to sell cocaine, and the parties agreed to a five-year sentence. The trial court denied the Defendant's request for alternative sentencing and ordered that he serve the agreed five-year sentence in prison. On appeal the Defendant contends that the trial court erred when it denied his request for alternative sentencing. Finding no reversible error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, James William "Bo" Jones.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the Defendant's indictment on one count of attempt to sell cocaine, one count of attempt to deliver cocaine, and one count of conspiracy to sell cocaine. The Defendant pled guilty to the conspiracy charge, and, at the guilty plea hearing, the State told the court that, had the case gone to trial, the evidence would have been the following:

> [The witnesses in this case] would testify these events occurred in Marshall County, Tennessee on April 15 . . . of 2004.

They would testify that they were working with a confidential informant who was attempting to make a purchase of drugs from one Lonnie Ray Pettigrew. There were some phone calls placed to Mr. Pettigrew, which were recorded. The confidential informant . . . spoke to Mr. Pettigrew about purchasing 8 grams of cocaine for different prices . . . rang[ing] from $450 down to [$]400. . . .

[T]he final negotiations were for delivery of $400 for 8 grams of cocaine.

Mr. Pettigrew told the confidential informant to meet with him at a location here in Lewisburg on West Commerce Street in the parking lot of the liquor store.

The confidential informant went to that location. He was followed by a surveillance team and prior to going to that location and making the phone calls, they not only wired his vehicle up after searching it, they also placed a video camera which made video tapes . . . .

They focused the camera in on the passenger side of the truck seat.

As they arrived and set up at the liquor store parking lot, within a few moments of their arrival, the surveillance team observed the [D]efendant here, Mr. Jones, on 5th Avenue walking toward[s] West Commerce. They then saw Mr. Jones walk up to the confidential informant's vehicle. They then observed him get into the passenger side of that vehicle, at which point he was picked up on that video camera as well as the recording devices in the truck.

A few moments later, they saw Mr. Jones exit the vehicle and walk back in the direction from whence he had come. They then followed [the Defendant] and observed him meet with Mr. Pettigrew and Mr. Eric Jett . . . .

They were able to also listen over a monitoring device that conversation that was going on in the pick-up truck . . . . What they heard was . . . that the confidential informant had been provided with a set of digital scales. When he put the dope or the substance on the digital scales, it only weighed, bag and all, 5.7 grams. The confidential information felt that he was being ripped off and told [the Defendant] that he would only pay $300 for that amount and not the [$]400 agreed to.

[The Defendant] told him to wait there while he checked on the price. And that is when [the Defendant] left and went back to Mr. Pettigrew in Mr. Jett's front yard.

[T]hey observed [the Defendant] walking on off. He didn't go back to the truck. They then called Mr. Pettigrew and Mr. Pettigrew asked if his little buddy had delivered the 8 grams. The confidential informant informed Mr. Pettigrew

> that no, he had delivered 5.7 grams and $400 was not going to be paid for that amount.
>
> There was some more negotiation at which point Mr. Pettigrew . . . said he was going to have to get with the little dude and he would contact the confidential informant back.
>
> . . . .
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> There were several phone conversations; the end result is this:
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> . . . .
>
> Mr. Pettigrew . . . delivered for money which was given to him, a substance . . . analyzed . . . to be cocaine base, a Schedule II controlled substance weight 6.8 grams.

After questioning the Defendant, the trial court accepted the Defendant's plea of guilty on the charge of conspiracy to sell cocaine, and it dismissed the other two counts against the Defendant.

At a subsequent sentencing hearing, the Defendant's presentence report was entered into evidence, and it showed that he had the following previous convictions: underage consumption, June 1996; disorderly conduct, August 1998; joyriding, September 1998; simple possession of marijuana, August 1999; driving without a driver's license, January 2001; vandalism, October 2002. Additionally, Beth Ladner testified that she works for the Probation and Parole Department, and, as such, she prepared the Defendant's presentence report. She stated that, in the past, the Defendant had been placed on some form of alternative sentencing four times, and that there had been three probation violation warrants filed against him.

The Defendant testified that he pled guilty to this charge and agreed to a five-year sentence, to be served at thirty percent. The Defendant contended that he suffers from back problems and that an MRI showed that he has spinal problems. These problems cause limitations of him doing manual labor, and he has had problems finding a job. Therefore, the Defendant applied for disability but was denied. The Defendant was prescribed medication for his pain, and he intentionally over dosed on pain medication by taking too many pain pills. As a result he was hospitalized for four days, and he was taken off of the pain medication.

The Defendant admitted to conspiring to sell cocaine and said that he was in the wrong. He said that he was financially unstable and that was "pretty much" the reason why he had committed this crime. Because the Defendant was unemployed, he was attempting to get money so that he could help support his wife and child. The Defendant asked the trial court to place him on community corrections. He said that he had been in jail for ten months on this charge, and, in that time, he had learned a lot, including about Christianity.

On cross-examination, the Defendant conceded that he knew right from wrong when he committed this crime. The Defendant agreed that he was convicted of multiple crimes before he hurt his back until 1999 or 2000. He said that he was placed on probation in 1996 and in 1998, and his probation was revoked. He also agreed that he was convicted of simple possession in 1999. The Defendant discussed his work history, stating that the first four or five years after he got expelled from high school he did "[o]dds and ends" like roofing, carpentry and painting for "[d]ifferent people." He said that he got a job at Sanford in 1999 doing packing and he left that job for a job finishing sheetrock. The Defendant agreed that he had a child out of wedlock, whom was two years old and whom his mother is financially supporting and raising.

The Defendant said that he had only sold drugs twice, but he admitted that his probation had been revoked four times. He said that he was still asking for community corrections because he needed to be with his wife and child.

Based upon this evidence the trial court found:

> The sole issue before me today is whether or not this gentlem[a]n is entitled to one of the forms of alternative sentencing that are available to a sentencing judge in the state of Tennessee. I am aware that there is a presumption in favor of alternative sentencing in a case that is a C, D or E [felony]; and where he is a standard offender, which he is. The presumption is not in favor of probation, but is in favor of some form of alternative sentencing.
>
> The first appropriate inquiry for the Court is whether or not this presumption has been overcome.
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> I am aware of the sentencing considerations that are set out in 40-35-103. Among the criteria I am to examine is set out in 40-35-103(5), which is simply the potential or lack of potential for rehabilitation on the part of the defendant including the risk of committing another crime should I give him alternative sentencing.
>
> Several things stand out about this gentlem[a]n. He has a past record that is certainly not the wors[t] record I have ever seen.
>
> As far as convictions, he does have a 2002 conviction for vandalism up to $500; simple possession conviction from 1999; and joy riding conviction from 1998.
>
> What is of a great deal more concern to me, what I think bears on the likelihood of recidivism in this case, on the four occasions . . . when he has been placed on probation, he has violated that probation three different times. If we look at the dates we will find that . . . the disposition of those violations and the occurrences that led to them were far apart in time. He did this in '98. He did this in 2001 and he did this again in 2003; violated the terms of his probation on

> each of those occasions. Certainly that strongly suggests that he is not a good candidate for alternative sentencing. The only other factual matter that confirms that further to me is his employment record. I am aware that he testified about his back problem. I am sure there are some back difficulties, but if you will look at his work record from before that time, to say the least it is questionable or a spotty record.
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> . . . . It does appear to me that he is a poor candidate for alternative sentencing because there is a high likelihood he would repeat if placed on probation again.

It is from this order of the trial court that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it denied him alternative sentencing because he only committed this crime to provide for his family. Further, the Defendant contends that the presumption in favor of alternative sentencing was not overcome by the evidence presented. The State counters that the record contains ample evidence to rebut the presumption in favor of alternative sentencing.

When a defendant challenges the length or manner of service of a sentence, it is the duty of this Court to conduct a de novo review of the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "'conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Ross, 49 S.W.3d 833, 847 (Tenn. 2001) (quoting State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999)); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or statutory enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210 (2003); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Comm'n Cmts.

In the case under submission, we conclude that there is ample evidence that the trial court considered the sentencing principles and all relevant facts and circumstances. Therefore, we review its decision de novo with a presumption of correctness. Accordingly, so long as the trial

court complied with the purposes and procedures of the 1989 Sentencing Act and its findings are supported by the factual record, this Court may not disturb this sentence even if we would have preferred a different result. See Tenn. Code Ann. § 40-35-210, Sentencing Comm'n Cmts; State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). We note that the defendant bears the burden of showing that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; Ashby, 823 S.W.2d at 169.

A defendant "who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Furthermore, unless sufficient evidence rebuts the presumption, "[t]he trial court must presume that a defendant sentenced to eight years or less and not an offender for whom incarceration is a priority is subject to alternative sentencing and that a sentence other than incarceration would result in successful rehabilitation . . . ." State v. Byrd, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993); see also Tenn. Code Ann. § 40-35-303(a).

However, all offenders who meet the criteria are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing Moss, 727 S.W.2d at 235). Even if a defendant is presumed to be a favorable candidate for alternative sentencing under Tennessee Code Annotated § 40-35-102(6), the statutory presumption of an alternative sentence may be overcome if:

> (A) [c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) [c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

Tenn. Code Ann. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated § 40-35-103(5), which states, in pertinent part, "The potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5); see also State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). A court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and 114 as they are relevant to the section 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996).

In the case under submission, the evidence does not preponderate against the trial court's denial of an alternative sentence. As the trial court noted, the Defendant has a history of criminal convictions and a scant work history. Further, the Defendant's presentence report shows, and he admitted, that he has previously been sentenced to probation four times, and three

of those times he violated his probation. This clearly supports a finding that measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant, see Tennessee Code Annotated section 40-35-103(1)(A)-(C), so as to support the trial court's denial of alternative sentencing. The Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE